United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1496

To be argued by
ALLEN R. BENTLEY

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1496

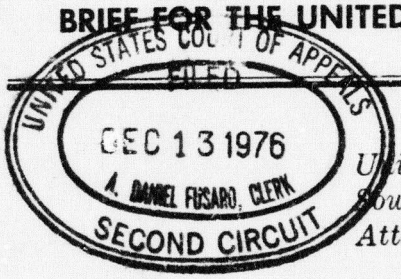
UNITED STATES OF AMERICA,
Appellant,

—v.—

RICHARD A. JACKSON, a/k/a "JOHN HARRIS",
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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Preliminary Statement

The United States of America appeals from an order of Honorable Charles L. Brieant, United States District Judge for the Southern District of New York, filed on October 8, 1976, denying the Government's motion, pursuant to Fed. R. Crim. P. 35, for correction of the sentence previously imposed by Judge Brieant on Richard A. Jackson as being illegal.

Statement of Facts

Indictment 76 Cr. 247, filed on March 12, 1976, charged Richard A. Jackson, a/k/a "John Harris", and Phillip Moore with bank robbery, in violation of 18 U.S.C. § 2113(a) (Count One), and bank larceny, in violation of 18 U.S.C. § 2113(b) (Count Two). The charges arose

from events which occurred at the Union Dime Savings Bank, 1065 Avenue of the Americas, New York, New York, on March 2, 1976. On June 21, 1976, Jackson entered a plea of guilty to Count One of the indictment. Sentencing of Jackson was scheduled for July 22, 1976.

Before imposing sentence on that date, Judge Brieant stated that the United States Probation Office had recommended that Jackson be sentenced as a youth offender to an indeterminate period of incarceration under 18 U.S.C. § 5010(b), but noted his reluctance to impose such a sentence because, in his opinion, by reason of the application of the Parole Commission guidelines, 41 Fed. Reg. 37316 (1976), a sentence under § 5010(b) would be unduly harsh. Judge Brieant then sentenced Jackson to one year's incarceration as a youth offender, ostensibly pursuant to 18 U.S.C. § 5010(d). (A. 25-27, 31).* The Assistant United States Attorney immediately noted that as the Government construed the Federal Youth Corrections Act, 18 U.S.C. §§ 5005 *et seq.* ("the Act"), a sentence of a fixed term under § 5010(d) was not a "youth offender" sentence under the Act. (A. 27-28). Judge Brieant replied that in his view, elaborated in an opinion filed in *Kayamakcioglu* v. *United States*, 418 F. Supp. 356 (S.D.N.Y. 1976), such sentence was a valid youth offender sentence. (A. 27-28). Judge Brieant volunteered that he would sign a certificate setting aside Jackson's conviction pursuant to 18 U.S.C. § 5021 if Jackson completed his period of incarceration with a decent record. (A. 28).

On September 29, 1976, the Government moved for an order pursuant to Fed. R. Crim. P. 35 correcting the sentence imposed on Jackson as illegal. (A. 32-40). By

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* The prefix "A." followed by a number refers to pages within the Government's Appendix.

memorandum and order filed October 8, 1976, the District Court denied the Government's motion. (A. 41-50). Adopting in large measure the reasoning of *Kayamakcioglu, supra*, Judge Brieant held that the sentence which had been imposed on Jackson was valid because:

> "It is preposterous to suggest that the net effect of the indeterminate provisions enacted by Congress in § 5010(b), taken together with the Guidelines subsequently imposed by the Executive Branch of Government, prevent this Court from sentencing a youthful offender as such, when his situation is too serious to justify probation under § 5010(a), but not serious enough to justify imprisonment for the full period of the guidelines.
>
> Subsection (d) of § 5010 is an integral part of the statutory scheme to allow the Court, in its words, to 'sentence the youth offender under any other applicable penalty provision'. The Court believes that it was not the intent of Congress in so doing to imply that such a sentence was an adult sentence. The Court has the power to treat youthful offenders as adults if the Court is of the opinion that the youth will not benefit from being treated under the Youth Corrections Act, and because of the gravity of his crime, or the extent of his prior record, ought to be sentenced as an adult. If that were the sole purpose of subsection (d), then subsection (d) would be totally superfluous, since no recourse to the optional provisions of the Youth Corrections Act are needed in order to sentence a youth as an adult. We should not construe any statute as containing an intentional superfluity." (A. 45-46).

Jackson is now serving his sentence at the Robert F. Kennedy Center, Morgantown, West Virginia.

ARGUMENT

The Sentence Imposed on Jackson was Illegal under *United States v. Cruz*, Docket No. 76-1337, slip op. 503 (2d Cir., November 10, 1976).

At the time of Judge Brieant's ruling in this case, he, together with Judge Frankel, took the position that the District Courts are empowered to sentence an appropriate defendant as a youth offender and impose a judicially determined "ceiling" on the sentence. Indeed, in his memorandum opinion in this case, Judge Brieant specifically endorsed Judge Frankel's opinion in *United States* v. *Cruz*, 417 F. Supp. 289 (S.D.N.Y. 1976) (A. 47), which he said he "cannot hope to improve upon." The reasoning and positions adopted by Judge Frankel in *Cruz* and by Judge Brieant in this case do not differ in any material respect.

Since the time of Judge Brieant's ruling in this case, this Court has reversed Judge Frankel's decision in *Cruz* and specifically rejected his view of the power of the District Courts to impose ceilings on a Youth Corrections Act sentence. *United States* v. *Cruz*, Docket No. 76-1337, slip op. 503 (November 10, 1976). In particular, this Court concluded that since "[t]he emphasis in structuring the Act was on treatment of youthful offenders under the watchful eye of an informed professional body which would tailor the length of sentence actually to be served to fit the needs of the individual," slip op. at 507, an indeterminate sentence, or probation under 18 U.S.C. § 5010(a), were the only sentencing alternatives statutorily authorized by the Act. It thus held that the sentence imposed on Cruz, which included a maximum of two years' confinement, was "illegal under the Act," slip op. 508, and vacated the sentence.

The *Cruz* decision is absolutely dispositive of this case. Rather than reiterating in this brief the position taken by the Government in *Cruz* and the exploration of the structure of the Act and the legislative history underlying it, we are submitting as part of our Appendix (A. 54-75) the Government's Brief in the *Cruz* appeal. The considerations explored in depth in that brief, as well as in this Court's opinion in *Cruz*, demonstrate overwhelmingly the invalidity of the sentence imposed in this case.

While the *Cruz* case differs from the present case in two respects, we submit that neither of those differences offers any ground for distinguishing the principles decided in *Cruz* from the facts of this case. First, in *Cruz*, the Government did not initially articulate in the District Court its view that the Act did not authorize imposition of a judicially-imposed ceiling on youth offender sentences. Rather, in that case the Parole Commission refused to accord Cruz certain of the benefits of the Act, on the ground that the court had been unauthorized to grant them together with a judicially-imposed ceiling. Cruz then moved for a reduction of his sentence under Rule 35, at which point the Government argued to Judge Frankel for the first time its view that the court could not impose a ceiling. Cruz appealed the denial of his Rule 35 motion, and in its opposing brief the Government articulated to this Court its view that any sentence imposed on a defendant designated a youth offender must be truly indeterminate. It was in this procedural posture that this Court resolved the issue of the District Court's power in a manner flatly inconsistent with Judge Brieant's ruling in this case. If anything, the difference in the procedural means by which the issue is presented to this Court in this case—in which the Government promptly articulated its position in the District Court (*see* A. 27-

28)—makes this case even a more appropriate one for appellate review, and certainly does not offer any ground to distinguish it from *Cruz*.

Second, the *Cruz* case involved a sentence under the provisions of 18 U.S.C. § 5010(b)* rather than 18 U.S.C. § 5010(d),** which was chosen by Judge Brieant in this case. The *Cruz* opinion was clearly based upon considerations affecting the Act as a whole, and certainly was not limited to sentences imposed under section 5010(b). Indeed, the *Cruz* opinion clearly stated:

> we conclude that a district judge is given only three options under the Act: (1) probation, under § 5010(a), (2) an indeterminate period of confinement with a maximum of six years, under §§ 5010 (b) and 5017(c), and (3) an indeterminate period of confinement with a maximum equal to the period authorized by law for the offense, under §§ 5010

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* Section 5010(b) reads:

> If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter. . . .

** Section 5017(d) reads:

> A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

> (c) and 5017(d). While a district judge can choose between the latter two options when deciding upon confinement, "the actual duration of the treatment period is determined by the Youth Correction authorities." *Dorszynski* v. *United States*, 418 U.S. 424 (1974), concurring opinion, *supra*, 445 n.1. This does not contemplate the setting by the court of a fixed maximum not provided for by the Act.

Slip op. 506-07 (footnotes omitted).

It is thus clear that Judge Brieant's ruling, which antedated this Court's decision in *Cruz*, is simply incorrect under that decision, and should be reversed. The case should be remanded to the District Court for resentencing in accord with the *Cruz* opinion.

CONCLUSION

The judgment of conviction should be vacated, and the case remanded for resentencing in accordance with this Court's opinion in *United States* v. Cruz.

Respectfully submitted,

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